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No. 85-1178

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

CHATTEM, INC., a corporation,

Petitioners

v.

WESLEY T. BAILEY,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT WESLEY T. BAILEY IN OPPOSITION

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Question Presented

Whether the trial and entry of judgment in this diversity action by a Federal Magistrate with the consent of the parties pursuant to 28 U.S.C. § 636(c) was consistent with the requirements of Article III of the Constitution.

Statement of the Case

This is an action for fraudulent misrepresentation, breach of contract, and the destruction of foreign patent rights and trade secrets, brought by Wesley T. Bailey, respondent here, against petitioner, Chattem, Inc. The complaint was filed February 27, 1979. Jurisdiction before the trial court was based on diversity of citizenship. The case was tried before the United States Magistrate, under 28 U.S.C. § 636(c), pursuant to consensual stipulations of reference entered October 16, 1979 and February 11, 1980. A jury trial resulted in a verdict for the plaintiff. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed in part, reversed in part, and remanded for a trial on the issue of the amount of compensatory

damages for fraudulent misrepresentation, only. Bailey v. Chattem, 684 F.2d 386 (6th Cir. 1982).

After the remand, and over two months after the entry of the judgment on the mandate of the Sixth Circuit, Chattem sought under Rule 60(b)(4) to set aside the judgment as void, contending that 28 U.S.C. § 636(c) was unconstitutional to the extent it permitted a Magistrate to conduct a full jury trial, and enter judgment. Chattem also sought to withdraw its consent to further conduct of the trial by the Magistrate. By order entered April 25, 1983, the District Judge, finding that the requirements of 28 U.S.C. § 636(c)(6) had not been met, denied Chattem's motion to withdraw its consent to trial before the Magistrate. By order dated May 26, 1983, the Magistrate denied the defendant's motion pursuant to Rule 60 to set aside the judgment.

On the trial of the damage issue, the jury returned a verdict in favor of the plaintiff in the amount of Six Hundred Twenty-seven Thousand Dollars ($627,000). On appeal, the Court of Appeals affirmed.

Argument

Chattem asserts that permitting Magistrates to try cases and enter judgment pursuant to the provisions of 28 U.S.C. § 636(c) is unconstitutional on two interrelated grounds: First, the petitioner asserts that the use of a magistrate pursuant to Section 636(c) is forbidden by Article III of the Constitution and the principle of separation of powers implicit in it. Secondly, Chattem contends that "the Tenth Amendment and principles of federalism" prohibit the use of magistrates to decide purely state law matters. In response, respondent Bailey believes that Chattem's analysis is clearly flawed, and that there is no basis upon which to conclude that the procedure established under 28 U.S.C. § 636(c) is constitutionally infirm.

At the outset, we would note that every Court of Appeals that has considered the issue has upheld the constitutionality of 28 U.S.C. § 636(c). See, e.g., Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984), cert. den., _____ U.S.

_____, 105 S.Ct. 172 (1984); Collins v. Foreman, 729 F.2d 108 (2nd Cir. 1984), cert. den. sub. nom., Foreman v. Collins, _____ U.S. _____, 105 S.Ct. 218 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3rd Cir. 1983); Gairola v. Commonwealth of Virginia, Department of General Services, 753 F.2d 1281 (4th Cir. 1985); Puryear v. Ede's Limited, 731 F.2d 1153 (5th Cir. 1984); K.M.C. Company, Inc. v. Irving Trust Company, 757 F.2d 752 (6th Cir. 1985); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Lehman Brothers Kuhn Loeb Inc. v. Clark Oil Refining Corporation, 739 F.2d 1313 (8th Cir. 1984) cert. den., _____ U.S. ____, 105 S.Ct. 906 (1985); Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984), cert. den., _____ U.S. _____, 105 S.Ct. 100 (1984); Fields v. Washington Metropolitan Area Transit Authority, 743 F.2d 890 (D.C. Cir. 1984); D.L. Auld v. Chromagraphics, 753 F.2d 1029 (Fed. Cir. 1985), cert. den., _____ U.S. _____, 106 S.Ct. 83 (1985).

Chattem has not sought to distinguish those decisions, and has not put forward any convincing reason to reject them. The constitutional questions raised by Chattem have been extensively and convincingly analyzed, at length, in these several opinions cited, and need no extended discussion here. The arguments advanced by Chattem have been uniformly rejected. Contrary to the claims of Chattem, there is at present no unsettled question of law deserving plenary consideration by this Court.

Chattem's essential reliance is on Northern Pipeline Construction Company v. Marathon Pipeline Company, 458 U.S. 50 (1982), and is misplaced. Chattem fails to recognize the essential distinctions between the situation presented here and that in Northern Pipeline. Under the provisions of 28 U.S.C. § 636(c), Article III judges appoint the magistrates; make a determination whether to refer a specific case, or in fact any case, to a magistrate; exercise control over the contempt powers; and may decide whether to vacate the reference of a case to a magistrate at any point. Accordingly, the

District Court judge retains effective control throughout the proceedings so that the "essential attributes of judicial power" are retained by Article III judges. Thus, the Magistrate Act is not an encroachment at the expense of the judicial branch, and does not implicate the separation of power issues that troubled the plurality in Northern Pipeline. Chattem has also argued that a threat to judicial independence may arise from within the judicial branch as well as from without. However, this is not, properly speaking, a "separation of powers" problem. Rather, this is a matter of policy, of less than constitutional dignity, more properly addressed to Congress. See Collins v. Foreman, 729 F.2d 108, 115 (2nd Cir. 1984).

The arguments that have been advanced by the various challenges to the constitutionality of 28 U.S.C. § 636(c) are both intricate and legion. However, the crux of the issue, and the essential reason that all these arguments have been rejected is this: Arguably, the restrictions imposed by Article III have two purposes -- to maintain the

separation of powers of the various branches of government, and to ensure the rights of litigants to a fair adjudication of their dispute. Concerns of the latter sort are allayed by the requirement that litigants consent to the reference to the magistrate under 28 U.S.C. § 636(c); a party can hardly complain of the quality or characteristics of a forum he has voluntarily chosen. With respect to the first concern, the Magistrates' Act presents no problems with respect to the separation of powers because complete power over the magistrates remains in the judicial branch so that no "encroachment" is involved.

While, as noted by Chattem, jurisdiction cannot be conferred by the parties by consent, consent is certainly not irrelevant to the exercise of jurisdiction. This was implicitly recognized by this Court in its analysis of the issues raised in Northern Pipeline:

> In fact, all four opinions filed in Northern Pipeline noted the importance of consent in this context. See, 458 U.S. 80 n. 31, 102 S.Ct. at 2876 n. 31 (plurality opinion)

> ("Before the [1979] Act, the referee had no jurisdiction" under 11 U.S.C. § 46(b) "except with consent."); id. at 91, 102 S.Ct. at 2881 (Rehnquist, J., concurring) ("I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution."); id. at 92, 102 S.Ct. at 2882 (Burger, C.J., dissenting) (stating that absence of consent was central to the Court's holding); id. at 95, 102 S.Ct. at 2884 (White, J., dissenting) (arguing that Court's holding should be limited to cases not involving consent) (emphasis added).

Collins v. Foreman, 729 F.2d 108, 119 (2nd Cir. 1984).

The relevant distinction, which Chattem fails to recognize, is that between the jurisdiction of the Court as an entity, and the actions of a particular officer of that Court. In the instant case, as in those cases generally challenging 28 U.S.C. § 636(c), there is no question as to the jurisdiction of the Court, either over the subject matter of

the action or over the parties. The only question raised is whether a particular officer of that Court could properly exercise the authority that he did, under a statute presumptively valid.

> [W]hen a civil case properly within the jurisdiction of an Article III Court is tried before a magistrate pursuant to an order of reference by the district court jurisdiction remains vested in the district court and is merely exercised through the medium of the magistrate.

Muhich v. Allen, 603 F.2d 1247, 1251 (7th Cir. 1979) [discussing 28 U.S.C. § 636(b)].

This distinction has been pointed out in cases dealing with 28 U.S.C. § 636(c) as well.

> As Pacemaker pointed out, jurisdiction in the usual sense may not be conferred by consent. The limits on the district court's subject matter jurisdiction, as set by the Constitution or by statute, may not be waived by agreement of the parties. [Citations omitted]. In this case, however, jurisdiction was given

> to the district court by Congress . . . the consent of the litigants had no part in the process. . . .
>
> The parties' consent went not to the jurisdiction of the court as an entity, but to the judicial officer within the court who conducted the trial. Waiver of a particular mode of trial or fact finder is not unknown. . . . To that extent there is long-standing recognition of the right of the parties to consent to a specific form of trial within the district court.

Wharton-Thomas v. United States, 721 F.2d 922, 926 (3rd Cir. 1983).

In the instant case, Chattem consented to trial before the Magistrate. It chose this particular "mode of trial". Chattem did not question the Magistrate's authority until after approximately four years at litigation, including a full jury trial and appeal to the Sixth Circuit Court of Appeals. At the time Chattem first raised the constitutional issue that it now brings before the Court, the reference to the Magistrate was over three years old. Prior to that, Chattem had

never questioned the Magistrate's probity or competence.

Under the circumstances, equity would hardly be served by the grant of Chattem's petition for review. In the view of each of the trial judges who ruled upon various aspects of the constitutional issues belatedly raised by Chattem, its efforts constituted merely an attempt to avoid the effect of an unfavorable judgment, and merited neither sympathy nor relief. In his order of April 25, 1983, denying Chattem's motion to withdraw its consent to trial before the Magistrate, the Honorable Judge Pittman, sitting in the absence of a regular district judge after the death of Judge Frank Wilson, stated:

> In this case the defendant has waited until after the entry of an unfavorable judgment following appeal and after the setting of a trial date to question the Magistrate's jurisdiction. The case is set for trial in June, 1983. The Magistrate who initially tried the case enjoys familiarity with the issues and history of the lawsuit superior to that of a successor judge. For these

> reasons, the Court believes that the Magistrate should retain jurisdiction of the instant case.

In his order of July 18, 1983, denying Chattem's request for certification of an interlocutory appeal of its request to withdraw its consent to the Magistrate, the Honorable H. Ted Milburn, then newly appointed District Judge, who has since been elevated to the Court of Appeals for the Sixth Circuit, stated:

> Furthermore, Chattem's contention that the Federal Magistrates' Act runs afoul of Article III of the Constitution appears dilatory . . . Thus, Chattem's motion to declare the Magistrate's judgment void involved only trivial issues and did not constitute such a circumstance as would warrant vacation of the reference.

Bailey submits that the failure of Chattem to question the constitutionality of the Magistrates' Act until these proceedings were well advanced militates further against the acceptance by this

Court of Chattem's petition. The question of the constitutionality of the Magistrate's Act has, over the past several years, become well settled. Chattem has raised no new issues justifying review by this Court.

Conclusion

Respondent Bailey asks that the Petition for Writ of Certiorari be denied. Furthermore, given the weight of authority on the issues raised by Chattem in its petition, Bailey asks that this Court exercise its discretion to award to him costs and damages pursuant to Rules 49.2 and 50.7.

Respectfully submitted this 12th day of February, 1986.

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